No. 89-1593

In The Supreme Court Of The United States

OCTOBER TERM, 1989

CARL E. McAFEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER A JUROR'S FAILURE ON VOIR DIRE EXAMINATION TO DISCLOSE THAT SHE HAD HAD A ROMANCE WITH AN ASSISTANT U. S. ATTORNEY WHO PARTICIPATED IN THE INVESTIGATION OF THE CASE AGAINST THE DEFENDANT REQUIRES THAT THE CONVICTION BE REVERSED SINCE DEFENDANT WOULD HAVE STRUCK THE JUROR HAD THE RELATIONSHIP BEEN REVEALED.

2. WHETHER THE PROSECUTOR'S PERSISTENT QUESTIONING OF DEFENDANT ON ALLEGED CRIMINAL MISCONDUCT, WHICH CAST THE DEFENDANT IN AN EXTREMELEY UNFAVORABLE LIGHT BEFORE THE JURY, ON MATTERS UNRELATED TO THE INDICTMENT AND ON WHICH NO EVIDENCE AT ALL WAS INTRODUCED TO THE JURY REQUIRES THE CONVICTION TO BE SET ASIDE.

3. WHETHER THE DEFENDANT, AN ATTORNEY, COULD BE CONVICTED UNDER 31 U.S.C. § 5313 FOR GIVING ADVICE TO A CLIENT, WHO HAD RECEIPTS FROM ILLEGAL DRUG DEALS, TO MAKE BANKING TRANSACTIONS UNDER $10,000 (TO AVOID THE BANKS HAVING TO REPORT THE TRANSACTIONS TO THE IRS) WHEN THE LAW AT THAT TIME SPECIFIED BANKS AND DID NOT LIST OTHERS AS BEING SUBJECT TO THE CASH TRANSACTION REPORTS REQUIREMENT.

4. WHETHER THE DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT DID NOT PERMIT AN ATTORNEY, AN EXPERT, TO TESTIFY THAT A REASONABLY PRUDENT ATTORNEY WOULD HAVE GIVEN THE SAME ADVICE DEFENDANT GAVE THAT RESULTED IN HIS CONVICTION.

5. WHETHER THE DEFENDANT'S CONVICTION ON COUNT 4 OF THE INDICTMENT IS A LESSER INCLUDED OFFENSE OF COUNT 5 ON WHICH HE WAS CONVICTED AND IS THUS PROHIBITED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

6. WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANT ON ANY OF THE COUNTS CHARGED IN THE INDICTMENT.

LIST OF PARTIES

The following is a list of all parties, their respective positions in the proceeding before the Fourth Circuit Court of Appeals, and the parties' respective counsel:

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES CONTINUED PAGE

STATUTES

OTHER AUTHORITIES PAGE

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fourth Circuit is attached as Appendix A. The unreported decision of the District Court, Western District of Virginia, is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered February 9, 1990. This petition is being filed within ninety days of the date of the Fourth Circuit's decision.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction over the proceedings pursuant to Title 18 of the U.S.C. §§ 2, 3, 1001, and 1952 and 31 U.S.C. §§ 5313 and 5322 and 31 C.F.R. § 103.22.

UNITED STATES CODE SECTIONS INVOLVED

(See Appendix C for contents of sections noted below)

18 U.S.C.S. § 2. Principals

18 U.S.C.S. § 3. Accessory after the fact

18 U.S.C.S. § 1001. Statements or entries generally

18 U.S.C.S. § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

31 U.S.C.S. § 5313. Reports on domestic coins and currency transactions

31 U.S.C.S. § 5322. Criminal penalties

31 C.F.R. § 103.22 Report of Currency Transactions (1984)

UNITED STATES CONSTITUTION

AMENDMENT INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CARL E. McAFEE PETITIONER

V.

UNITED STATES OF AMERICA RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Carl E. McAfee, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on February 9, 1990.

STATEMENT OF THE CASE

Carl McAfee, a Virginia lawyer, appeals his conviction on four counts of a five count indictment charging him with aiding and abetting a client, Olga Thrasher, to commit certain crimes and being an accessory after the fact to other crimes.

Mrs. Thrasher's husband, who had been engaged in illegally importing drugs, had reportedly died a tragic death in the country of Belize. Mrs. Thrasher hired McAfee to help settle her husband's estate.

Mrs. Thrasher received advice from McAfee that if a death certificate for her husband could be obtained that her position would be aided. She further testified that McAfee advised her to have a meeting set up with a Jamaican

attorney who could assist them in obtaining a false death certificate. Such a death certificate was obtained. She used a copy of the death certificate to obtain a house in Florida and to make a claim on a life insurance policy.

Count 1 of the indictment against McAfee alleged that he was an accessory after the fact to the drug offenses of Wallace and Olga Thrasher.

Count 2 charged that McAfee engaged in interstate travel to facilitate Olga Thrasher's drug business.

Count 3 charged that McAfee aided and abetted Thrasher in committing mail fraud with respect to use of the death certificate to make a life insurance claim.

Count 4 alleged that McAfee aided and abetted Thrasher in causing a local

bank to fail to file the currency transaction report as required by law and further caused the bank to make a false statement as a result.

Count 5 charged McAfee with aiding and abetting Thrasher and causing the bank to fail to file a CTR.

McAfee was acquitted on Count 3 of the indictment.

Thrasher said she told McAfee that most of her assets had come from drug deals. She said she was advised by McAfee to make deposits of money in amounts less than $10,000 so that the banks would not have to issue a currency transaction report. She testified she was already aware of the currency reporting law. She went to several banks and converted the cash she had

into cashier's checks in order to purchase some land.

During the trial, the Assistant U. S. Attorney prosecuting the case asked McAfee several questions which had nothing to do with the case before the court and on which the government offered no evidence, but which questions were damaging to McAfee in that they cast him in a bad light. While the court sustained McAfee's objections, the jury was nonetheless present when the questions were asked.

After the trial, McAfee learned that one of the jurors had failed to reveal a romantic relationship she had had with an Assistant United States Attorney. Even though the Assistant United States Attorney did not participate in the trial of the case, he

helped investigate the case against McAfee and assisted the government in the preparation for it. The same night the verdict was returned he was telephoned about the case by the juror.

Even though inquiries were made by McAfee's lawyers on voir dire examination that would ferret out the existence of relationships that would create conflicts, the juror did not even reveal that she knew the Assistant United States Attorney. And even though the prosecutor who tried the case knew of the relationship, he did not bring its existence to the attention of the court.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The district court had jurisdiction under 18 U.S.C.S. §§ 2, 3, 1001 and 1952

and 31 U.S.C.S. §§ 5313 and 5322 and 31 C.F.R. § 103.22. (See Appendix C).

ARGUMENT

1. The failure of the district court to award the defendant a new trial after it was discovered that a member of the jury had failed to disclose a romantic relationship with one of the Assistant United States Attorneys who had been involved in the preparation of the case and which juror did not disclose the relationship on voir dire examination so far departs from the accepted and usual course of judicial proceedings that the writ of certiorari should be granted.

The district court noted in its ruling that the issue of the affect of a federal criminal conviction of a juror's

non disclosure of pertinent information despite a relevant voir dire inquiry, "is not a model of clarity" and the United States Supreme Court has never addressed the issue.

In Cannon v. Lockhart, 850 F.2d 437 (8th Cir. 1988), the court held that even an inadvertent nondisclosure will require a new trial if the juror had information that would cause her "to be prejudiced in her deliberation."

In the case before the court, the juror and the Assistant United States Attorney saw each other socially in 1985 before they began dating the same year. They dated each other steadily for two to three months. They got together for drinks, for dinner and were guests at each other's homes. The attorney testified that the relationship was very

close. He recommended to the prosecutor who tried the case that she would be an "excellent juror."

Although the Assistant U. S. Attorney did not try McAfee's case, he was in the courtroom during the trial twice. On one of those occasions, he and the juror nodded greetings to each other. When questioned about the contacts she had had with the attorney after the McAfee trial, the juror did not disclose that she had called the Assistant U. S. Attorney within hours of the verdict in McAfee's case.

The Assistant U. S. Attorney assisted in the trial preparation process of McAfee's case. He argued some of the pre-trial motions. He attended the defendant's polygraph

examination and obtained a statement from another witness in the case.

The relationship between the juror and the Assistant U. S. Attorney is so strongly indicative of bias that a new trial is warranted.

This is especially true since the defense attorneys on the voir dire specifically asked about the relationship between jurors and the prosecutor's office.

2. During the trial, the prosecutor of the case repeatedly was able to get before the jury questions that were highly prejudicial to McAfee but which sought strictly inadmissable evidence. For example, the prosecutor asked McAfee the following question: "Now, in 1980, one of your planes down in Lonesome Pine (airport, Wise, Virginia), was this

supposed to carry marijuana from Columbia, South America up to Wise County?" Although this question was totally irrelevant and the court sustained McAfee's objection, the jury nevertheless heard the question. The decisions in United States v. Love, 534 F.2d 87, 89 (6th Cir. 1976) and United States v. Perry, 512 F.2d 805 (6th Cir. 1975) require that this single incident would be grounds for reversal of the conviction even if no other act of misconduct by the prosecutor had occurred.

But the prosecutor in this case committed several other flagrant violations of McAfee's due process rights. He improperly implied that McAfee was hiding relevant evidence. Even though the court sustained

defendant's objection, the jury had already heard the question. The prosecutor improperly accused McAfee of suborning perjury. The prosecutor improperly accused the defendant of having a "bad" drinking problem. The prosecutor also attempted to raise questions about McAfee's income tax returns. The objections to that inquiry were sustained. Also, the prosecutor tried to link McAfee's witnesses with misconduct. And although the court sustained defendant's objections to the many instances of untrue and improper allegations by the prosecutor, the jury nevertheless had the opportunity to hear the questions. The bell could not be unrung.

Clearly, the prosecutor's misconduct was a pattern by which he

represented to the jury that he had facts concerning McAfee's guilt on other offenses and the credibility of McAfee and his witnesses. However, not a shred of this information was introduced to the jury. Such conduct is "clearly" improper. Berger v. United States, 295 U.S. 78 84, 55 S.Ct. 629, 79 L.Ed. 1314, 1319 and n. 1 (1935). McAfee's case warrants a reversal because "it is more probable than not that the improper remarks materially affected the verdict." United States v. Prantil, 764 F.2d 548, 556 (9th Cir. 1985).

3. There is a "severe split" among the federal courts as to whether the advice McAfee gave his client concerning structuring the purchasing of currency in amounts less than $10,000 is illegal advice.

McAfee's advice was legal in the First (United States v. Anzalone, 766 F.2d 676 (1985)), Eighth (United States v. Larson, 796 F.2d 244 (1986)), Ninth (United States v. Varbel, 780 F.2d 758 (1986)), and Eleventh (United States v. Danemark, 779 F.2d 1559 (1986)) Circuits. It would be considered illegal in the Second (United States v. Heyman, 794 F.2d 788 (1986)), Fourth (United States v. Richeson, 825 F.2d 17 (1987)) and Tenth (United States v. Cook, 745 F.2d 1311 (1984)) Circuits. McAfee resides in the Fourth Circuit where the case was determined.

Under Counts 4 and 5, McAfee was charged with improperly advising Olga Thrasher to go to different branches of local banks to purchase $85,000 in cashier's checks so that no single check

would exceed $10,000. By so "structuring" her purchase, Thrasher could avoid the reporting requirements of 31 U.S.C. § 5313 which, along with associated regulations, see 31 C.F.R. 103.22 (1984 ed.), required banks to file Currency Transaction Reports (CTR's) to the IRS for all cash transactions in excess of $10,000.

McAfee challenges that he violated the law on the basis that, prior to the date of the offense he was charged with, there was no specific statutory regulation which required a customer to refrain from "structuring" a transaction, or do or refrain from doing any other act. There was no specific regulation even though 31 U.S.C. § 5313 specifically gave the Secretary of the Treasury the authority to enact such a

regulation if he desired. After McAfee's case, such a change was made. McAfee contends that since there was nothing requiring a bank customer to report a CTR or to refrain from structuring a transaction, then he as a lawyer giving advice could not be convicted under a statute that only includes a requirement that the bank report the transaction.

4. Since McAfee's contention was that a reasonable and prudent attorney would have given the same advice that he did, he attempted to offer testimony on his behalf by another attorney as an expert witness. The court did not permit the witness to testify. But by way of a proffer of evidence, the attorney testified that the conduct of McAfee in advising his client with

respect to the transaction was in compliance with the conduct expected of a reasonably prudent attorney in Southwestern Virginia in 1984.

The testimony of the attorney should have been admitted for the jury to hear because "testimony concerning the ordinary practices of a business is admissible under the same theory as testimony concerning the ordinary practices of physicians or other trade customs" to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry. Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505, 509 (2d Cir. 1977), cert. denied 434 U.S. 861. In short, an expert may give an opinion that certain conduct or procedures were normal within a particular profession

and may explain why things are done in a particular way within that profession, but will not be permitted to testify that certain conduct was "unlawful" or "illegal."

5. Counts 4 and 5 of the indictment charged McAfee with assisting Mrs. Thrasher in avoiding the currency transaction reporting requirements of 31 U.S.C. § 5313. In order to convict McAfee on that charge, it must be determined that he "influenced the perpetration of the crime." United States v. Barnett, 667 F.2d 835, 841 (9th Cir. 1982). The offense must have been something he desired to bring about. United States v. Garcia-Jeronimo, 663 F.2d 738, 743 (7th Cir. 1981).

And the undisputed evidence was that she already knew the law about the cash transaction reporting requirement. Making the transactions under $10,000 was "Mrs. Thrasher's idea." She said she knew all about the CTR filing requirements and how to avoid them from her husband's prior activities. She also said that McAfee preferred that she did not purchase the cashier's checks.

Clearly, the evidence is insufficient as a matter of law to convict McAfee of Counts 4 and 5.

McAfee challenges the sufficiency of the evidence against him. He was charged with being an accessory after the fact. The government alleged that he rendered assistance to Mrs. Thrasher by (1) obtaining a false death certificate to "lull" the investigation

of the Thrashers; (2) secreting drug deal proceeds to the purchase of the Wytheville condominium; and (3) secreting the Aztec airplane and its parts which were part of the "marijuana enterprise." In order to be guilty of being an accessory after the fact, the defendant must have been guilty of obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the offense. United States v. Barlow, 470 F.2d 1245, 1252-53 (D.C. Cir. 1972). Unless the assistance has some tendency to "obstruct justice" it is not criminal. See Perkins, Criminal Law (2d Ed. 1969), p. 667.

With regard to the death certificate, there was no attempt by McAfee to submit the death certificate

to law enforcement personnel until after Mrs. Thrasher had been arrested and a plea bargain negotiated. Therefore, he could not possibly be an accessory after the fact to the crime charged.

McAfee did nothing to assist Thrasher in the "secreting" of the cash proceeds of Wallace Thrasher's drug deals. The transaction to purchase the Wytheville condominium was conducted in an open and public manner. All of the cashier's checks identified "Olga Thrasher" as the purchaser of the checks, and the deed clearly identified her as the purchaser of the property. The cash nature of the transaction was apparent from the public records. Thrasher knew that law enforcement personnel were closely watching the transaction, and yet proceeded with the

purchase.

Thrasher testified that the sole reason for purchasing the condominium was because she wanted to move from the rural Bland County house to a more populous area. The only reason she used cash was because she was in a hurry to move and there was no time to complete plans for alternative methods of purchasing the property. She said absolutely nothing about wanting to hide or secrete the cash.

Purchasing the condominium in the manner it was accomplished could not result in the cash being "secreted". Indeed, it could only have the opposite effect. A conviction on 18 U.S.C. § 3 cannot stand on this basis.

The evidence on the airplane parts was likewise insufficient to warrant

submission of the issue to the jury.

There was no evidence that the airplane or the parts had ever been used in any drug related activity. Far from being a part of a "marijuana enterprise," extensive repair work and overhauling, including the installation of the parts in question, would have been performed before the Aztec was ready for a "drug run."

Furthermore, the parts were not "secreted." Thrasher testified that the reason they were moved from Roanoke to Lonesome Pine were so that they could "be kept there," and be held as security for McAfee's legal fee. She said nothing about wanting to conceal their existence.

Absent proof that the parts were indeed part of a drug enterprise or were

in fact secreted, the conviction on Count 1 cannot stand.

CONCLUSION

This Court should grant the Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit because it fits squarely within the purview of Rule 17.1(a) of this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5145

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CARL E. MCAFEE,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Jackson L. Kiser, District Judge. (CR-87-18R)

Argued: November 3, 1989
Decided: February 9, 1990

Before MURNAGHAN and CHAPMAN, Circuit Judges, and NORTHROP, Senior United States District Judge for the District of Maryland, sitting by designation.

Guy M. Harbert, III; S. D. Roberts Moore (GENTRY, LOCKE, RAKES & MOORE; John P. McGeehan on brief) for Appellants.
Karen Breeding Peters, Assistant United States Attorney (John P. Alderman, United States Attorney, on brief) for Appellee.

CHAPMAN, Circuit Judge:

Carl E. McAfee, a practicing attorney in Norton, Virginia appeals his convictions of: (Count 1) being an accessory after the fact of the unlawful importation and distribution of marijuana by Wallace and Olga Thrasher in violation of 18 U.S.C. § 3; (Count 2) interstate travel to facilitate Olga Thrasher's drug business in violation of 18 U.S.C. §§ 1952 and 2; (Count 4) assisting Olga Thrasher in the structuring of a financial transaction so as to conceal drug assets in violation of 18 U.S.C. §§ 1001 and 2; and (Count 5) aiding and abetting Olga Thrasher in causing the Bank of Speedwell, Wytheville, Virginia, not to file the required I.R.S. Form 4789 for a currency transaction in excess of

$10,000 in violation of 18 U.S.C. § 2 and 31 U.S.C. §§ 5313 and 5322(a). At trial he was acquitted on a mail fraud charge (Count 3).

Appellant claims the district court erred (1) in refusing to order a new trial because of improper conduct by the prosecutor, (2) because of a juror's failure during voir dire examination to disclose her relationship with an Assistant United States Attorney, and (3) in refusing to admit into evidence an attorney's expert testimony regarding the conduct of a reasonably prudent attorney in Southwest Virginia in 1984. He also claims (4) that the double jeopardy clause prohibited a conviction under Count 4, (5) that his convictions under Counts 4 and 5 violated his right to due process because the language of

the statute is so unclear that ordinary people cannot understand it, and (6) that the evidence was insufficient to support convictions on any of the counts. We find no merit to any of the exceptions, and we affirm.

I.

An exhaustive recitation of the facts is unnecessary to an understanding of the case, but the following are provided. On October 17, 1984, a private plane loaded with marijuana crashed on Fancy Gap Mountain in Southwest Virginia. An unidentified body and a large load of marijuana were found on the crash site. Nelson King, who had survived the flight, contacted Wallace Thrasher at his home, proceeded there and received first aid. Wallace

Thrasher and King left the area to go into hiding. Wallace Thrasher was the husband of Olga Thrasher, he was the owner of the plane that crashed, and he was involved in the marijuana importation and sale of marijuana.

After finding the wreckage of the plane, police officers contacted Mrs. Thrasher, and she advised them that her husband was away on a business trip and she did not know when he might return. Pursuant to her husband's instructions, Olga retained Max Jenkins, a Radford, Virginia, lawyer to represent her husband in connection with any criminal liability arising from the crash. Jenkins was also to represent Olga with respect to her possible criminal exposure.

Olga testified that her last contact with her husband was a telephone call in which he stated that he was returning to the country of Belize to explain the plane crash to his marijuana suppliers, and to arrange another load of marijuana. Shortly after this call, Olga was informed that her husband had died in a plane crash to Belize and she arranged for a memorial service in Wytheville, Virginia. Attorney Jenkins suggested that they confirm Mr. Thrasher's death and advised that they contact the appellant Carl McAfee, because he was a lawyer experienced in dealing with foreign governments.

Olga Thrasher met with appellant and explained her husband's smuggling business, including the fact that most of their property had been purchased

with drug proceeds. She testified that appellant advised her of the possibility of her assets being seized by the government, and he advised that her position would be improved by obtaining a copy of a death certificate for her husband. Efforts were made to obtain more information about Thrasher's death without success.

Olga Thrasher was concerned with disposing of an Aztec airplane and a number of parts, particularly special avionics and long range fuel tanks. She wanted the aircraft overhauled and the parts installed so that it could be used for future drug deals. Appellant owned an interest in an air charter business at Lonesome Pine Airport in Wise, Virginia. He suggested that the plane be moved to Lonesome Pine where his

mechanic would do the necessary work. He also wanted to put a lien for services on the aircraft to prevent its seizure and to secure his fees. Douglas Griffin owned an interest in the plane and had it moved because he did not trust Mrs. Thrasher. The parts were moved to the airport at Lonesome Pine, but were subsequently removed to Florida, without appellant's knowledge.

Following word of her husband's death, Mrs. Thrasher did not wish to continue living in an isolated area of Bland County, and she contracted to purchase a condominium in Wytheville for $85,000. She discussed the transaction with appellant and he suggested that any newly acquired property might be seized and recommended that she obtain a loan on the property or form a corporation to

buy it. Mrs. Thrasher was in a hurry and she wished to close the transaction with a series of cashier's checks. She testified that appellant did not want her to purchase cashier's checks, but that he advised her to purchase in amounts less than $10,000 and that she should go to different branches of several banks so as to avoid the requirement that banks report to IRS the purchase of any check for cash in excess of $10,000. Mrs. Thrasher and her housekeeper purchased the necessary checks using different branches of three banks. Sovran Bank and Bank of Virginia realized what had happened and treated the purchases at their branches as one transaction and filed the IRS Form 4789. The Bank of Speedwell did not file this form. The real estate transaction was

closed and the purchase price paid by the various cashier's checks.

In January 1985, Mrs. Thrasher was served with a subpoena from the federal grand jury in Roanoke. The subpoena directed her to bring evidence, including a death certificate, relating to the alleged death of her husband. She testified that appellant suggested that they travel to Jamaica to obtain a false death certificate. She called Douglas Griffin and he suggested that she contact his marijuana connection in Jamaica. Appellant advised her to have the contact set up a meeting with a Jamaican attorney to assist them in obtaining a false death certificate. Later, Jenkins, Mrs. Thrasher, and appellant flew to Jamaica and obtained two copies of a death certificate

showing Wallace Thrasher had died as a result of a "tragic accident." One copy of the death certificate was given to Jenkins and the appellant kept the other. When Mrs. Thrasher appeared before the federal grand jury, she acted upon appellant's instructions and claimed her Fifth Amendment right not to testify. No mention was made at that time of the death certificate, but she later used it to consummate the sale of a house in Florida and to support a claim on a policy of credit life insurance issued to her husband. She testified that she did this pursuant to appellant's instructions. In March 1985 she discontinued her client-attorney relationship with appellant. Shortly thereafter she was arrested when she attempted to arrange the kidnapping and

murder of Nelson King, whom she believed to be lying about her husband's disappearance. She entered into a plea agreement with the federal prosecutor and cooperated in the prosecution of appellant.

Following a lengthy trial, McAfee was convicted of four of the five counts in the indictment. Approximately ten days after the jury verdict, appellant and his trial attorney were advised that Thomas Bondurant, an Assistant United States Attorney in the Roanoke office, had been romantically involved with Lyn Jackson, one of the jurors at McAfee's trial. Lyn Jackson was well known in the Roanoke area because she was one of the evening news anchors at a local television station. She knew a number of lawyers and was known by them because

she frequently covered stories arising from litigation and criminal prosecutions. Assistant United States Attorney Bondurant was also well known in the area, but he was not actively involved in the McAfee trial. He had interviewed one of the government's primary witnesses prior to trial but did not assist in the selection of the jury or in the presentation of the case. McAfee made a motion for a new trial claiming that Lyn Jackson was a biased juror and that this bias deprived him of his constitutional right to a fair trial before an impartial jury. He claimed that this information was known to the United States Attorney's office, but not known to him and could not have been discovered by him through the exercise of due diligence.

The trial judge ordered an evidentiary hearing and subpoenaed juror Jackson to testify. The court also reviewed the transcript of the voir dire proceedings when the jury was selected. Lyn Jackson testified and acknowledged a relationship with Bondurant that had ended two and a half years prior to trial. She described the relationship as having lasted a couple of months and not being serious. The record reflects that during the voir dire of the venire, Jackson was the first prospective juror to volunteer information in response to several questions asked by the court. She advised that she knew a number of lawyers and was known by them. She identified the defense attorney and Assistant United States Attorney Pierce, who was prosecuting the case, as persons

known to her. She also advised the court at the time of the voir dire examination that she knew of Olga Thrasher because of various news reports.

During the voir dire examination, the court asked the venire about contacts with the United States Attorney's Office or the law office of the defendant and explained "contacts" as follows:

> All right. Well, let me say this, the fact that you may have seen someone - I'm talking more about professional or social contact on an individual basis.
>
> The fact that you have seen a name in the paper or whatever, been in the courtroom, is not the type of information I am really looking for.
>
> With that caveat, do we have any more hands?

> All right, have any of you had any dealings of any kind with the United States Attorney's office in Roanoke, Virginia: had any occasion to have any type of contact with the office for which Mr. Pierce works?

Juror Jackson did not respond to this question and her failure to respond is the crux of the appellant's claim that she failed to disclose pertinent information and was thereby seated as a juror and prevented him from receiving a trial before an unbiased jury.

Lyn Jackson testified that she thought she had already identified contacts with the United States Attorney's Office and had already answered the question. She thought the court was repeating the question to other jurors who had not volunteered information. She stated that she thought after she had volunteered so

much information that no one needed or wanted to hear any more from her, that she had answered all of the questions honestly as she understood them, and that she had not thought of Mr. Bondurant during the voir dire examination. She testified that she had no prior knowledge of appellant and no bias against him.

Bondurant testified that their dating relationship had ended two and a half years before, that he occasionally talked with her by telephone but he had not seen her for more than a year prior to the trial. Assistant United States Attorney Pierce testified that he knew that Bondurant and Jackson had dated some years previously, but this information did not seem significant to him, and he did not understand the judge

to have asked for information on social contacts with persons not in the courtroom.

After hearing all of the testimony, the trial judge filed a memorandum opinion denying appellant's motion for a new trial. In the opinion the judge found as a fact that the question he proposed to the venire inquiring "about professional or social contact on an individual basis" asked for information that Jackson failed to disclose, but that her failure to provide the information was not intentional and was due to either misunderstanding of the question or inattentiveness. He further found that Jackson honestly answered the voir dire questions to the best of her memory and understanding and that there was no evidence of actual bias on her

part. The court also found that if Jackson had been struck from the jury and replaced by another juror, there would have been no difference in the outcome of the trial.

II

At the hearing on the motion for a new trial, eight people, including the defendant, testified. The court's findings of fact from that hearing are subject to review under the clearly erroneous standard of Federal Rule of Civil Procedure 52(a). This standard is particularly appropriate in the present case because the trial judge who conducted the post-trial hearing is the same judge who presided over the trial and conducted the voir dire examination of the venire. He is in the best

position to consider credibility and to weigh the evidence as to any bias.

The trial judge, following the dictates of Smith v. Phillips, 455 U.S. 209 (1982), and Remmer v. United States, 347 U.S. 227 (1954), conducted a hearing at which all parties were permitted to participate. The district court found that the failure of juror Jackson to answer one question during the voir dire was the result of either a misunderstanding of the question or inattentiveness. The court also found that Jackson was not biased against the defendant and that striking juror Jackson and replacing her with another juror would have made no difference in the outcome of the trial.

These findings are supported by the record and are not clearly erroneous.

The record reflects that Lyn Jackson was the first person on the venire to answer the court's inquiry about knowledge of the attorneys involved in the case. She stated that she knew both Assistant United States Attorney Pierce and Moore, the defendant's attorney. When the court inquired as to knowledge of Olga Thrasher, Jackson was again the first to state that she remembered the Olga Thrasher case. Upon direct inquiry from the court, she stated that she could disregard any prior knowledge and decide the present case fairly. When the court asked about publicity surrounding Wally Thrasher's plane crash at Fancy Gap Mountain, Jackson again was the first to answer that she remembered it. When the names of certain witnesses were revealed, Jackson admitted that she knew

prospective witness Keith Neely. When the venire was asked if anyone had a good friend who was a lawyer, she answered, "I know a lot of lawyers." There was no follow-up question to Jackson about lawyers, although there were follow-up questions asked to others on the venire who had admitted knowing lawyers.

In her testimony in the post-trial proceeding, Lyn Jackson stated that she had dated Thomas Bondurant for two and a half to three months in the fall of 1985. She stated that the relationship was not serious and that she had not seen Bondurant for more than a year prior to the trial.

The question that prompted the post-trial inquiry came after the court had asked the prospective jurors if they

knew the lawyers. Jackson responded: "I have dealt with them professionally." The court then asked her if they had represented her personally and she answered in the negative. There were then other jurors who indicated that they had seen the Assistant United States Attorney Pierce in the courtroom because of prior jury service. The court made the inquiry to the venire that has been previously set forth on page eight.

Appellant contends that this inquiry required Jackson to reveal the fact that she had dated Assistant United States Attorney Bondurant, who was not in the courtroom and did not participate in the prosecution, even though their relationship had lasted only two to three months and had ended two and a

half years prior to the trial. Since the juror had provided so much information in response to other questions, and had advised that she knew both attorneys in the present case and many other lawyers, it is understandable that she thought that the court's question was directed to others on the venire. Appellant argues that there was a substantial likelihood of bias and that the nondisclosure was intentional and required a new trial. Such a position would impute bias to a juror, and this is contrary to the holding of Smith v. Phillips, which found that bias is not to be imputed and that the opportunity to prove actual bias guarantees the defendant's right to an impartial jury. 455 U.S. at 216. McAfee was given this opportunity in the

post-trial hearing at which he and seven others testified, and this procedure met the due process standard of Smith v. Phillips:

> Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be at a hearing like that ordered in Remmer and held in this case.

Id. at 217.

III

We find no merit to the claim that prosecutorial misconduct requires a new trial. Appellant claims that certain questions asked of him during cross-examination were so irrelevant and prejudicial that the only proper remedy for such conduct is the granting of a

new trial. The trial judge sustained objections to some of the questions and gave instructions for the jury to disregard them. Some of the questions were the result of the defense attorney's rather personal assault on the prosecutor, on the government's case, and on the witnesses used to support it. As to certain other questions, the government had filed with the court a sealed letter setting forth the foundation of its belief that these questions were relevant. We have reviewed the "foundation letter" and when we consider its contents, we find that the trial judge did not abuse his discretion in permitting the prosecution to pursue the subject to which the defense objected on the cross examination of McAfee.

IV

We find no error in the trial judge's refusal to allow expert testimony from an attorney that a prudent lawyer in Southwest Virginia would have advised clients wanting to structure cash transactions using the proceeds of illegal drug sales that they should purchase cashier's checks of less than $10,000 each in order to avoid the filing of a Currency Transaction Report required by the Internal Revenue Service. This expert testimony was proffered as a defense to Counts 4 and 5 which charged McAfee with aiding and abetting Olga Thrasher in purchasing cashier's checks of under $10,000 from different banks so as to prevent the banks from filing the IRS Form 4789 as required by 31 U.S.C. § 5313.

Such testimony could only confuse the jury. There was no testimony that the defendant had researched the law on this point or had consulted with any other attorneys before advising Olga Thrasher to structure her purchase of the townhouse so as to avoid reporting the large amount of cash involved. An expert witness is not permitted to give an opinion as to what the applicable law may mean. See Adalman v. Baker, Watts & Co., 807 F.2d 359, 366 (4th Cir. 1986). Also, such testimony would conflict with our prior opinion, No. 87-5572, decided October 20, 1987, in United States v. McAfee, in which we reversed the district court's dismissal of Counts 4 and 5 and concluded that by operation of 18 U.S.C. § 2(b) the defendant's willful intent to cause a concealment, combined

with the bank's duty to report such a cash transaction, and its innocent failure to report, constituted the necessary elements of actionable concealment under 18 U.S.C. § 1001.

V

Appellant argues that Count 4 is a lesser included offense of Count 5 and that the prohibition against double jeopardy requires that the Count 4 conviction be merged into the Count 5 conviction. This question is addressed by Blockburger v. United States, 284 U.S. 299 (1932), which directs us to focus on the formal elements of the two crimes to determine if they require proof of the same essential facts, or if one requires proof of a fact which the other does not.

Count 4 charges that the appellant aided, abetted and counseled Olga Thrasher in making a false and fraudulent representation in a matter within the jurisdiction of the U. S. Treasury Department by using a scheme or device to conceal from the Treasury the transfer of U. S. currency in excess of $10,000 by concealing from the banks the fact that numerous cashier's checks of less than $10,000 were being used to structure a single transaction in violation of 18 U.S.C. §§ 1001 and 2. In Count 5 appellant is charged with aiding, abetting and counseling Olga Thrasher to cause the Bank of Speedwell not to file the Currency Transaction Report form 4789 in violation of 18 U.S.C. § 2 and 31 U.S.C. §§ 5313 and 5322(a). Count 4 requires the use of a

scheme or device to conceal the transaction. This scheme or device is the additional element that is not required by Count 5, which only requires a willful attempt to cause a bank to fail to file Form 4789.

Our facts are similar to and controlled by United States v. Woodward, 469 U.S. 105 (1985), which involved a violation of another currency reporting statute, 31 U.S.C. § 1085, and requires a report when more than $5,000 in currency is brought into the United States. Woodward was stopped on his arrival at the Los Angeles International Airport upon his return from Brazil. He had answered in the negative the usual customs form inquiring if he was carrying over $5,000. Further investigation revealed that he had

$12,000 in his boot. He was indicted under 18 U.S.C. § 1001 for making a false statement to an agency of the United States and for failing to report that he was bringing in excess of $5,000 into the United States in violation of 31 U.S.C. § 1058. The court held that Woodward's conduct could be punished under both statutes because § 1001 required proof that the material fact be concealed by a trick scheme or device, and conviction under 31 U.S.C. § 1058 required only proof of the willful transportation of money into the United States without filing the required currency report. The court found that the two code sections were directed at separate evils, and "[a]ll guides to legislative intent reveal that Congress intended respondent's conduct to be

punishable under both 18 U.S.C. § 1001, and 31 U.S.C. §§ 1058, 1101 (1976 ed.)." 469 U.S. at 109-110. This same reasoning is applicable to our facts.

VI

After a careful review of the record, we are persuaded that there is sufficient evidence to sustain the defendant's convictions on Counts 1, 2, 4, and 5. Count 1 charges defendant with being an accessory after the fact in violation of 18 U.S.C. § 3 which provides that: "[w]hoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact." It is alleged in Count 1 that appellant knew

that Wallace and Olga Thrasher had unlawfully imported and distributed marijuana, that the defendant knowingly and willfully assisted Olga Thrasher in order to hinder or prevent her apprehension, trial, and punishment by assisting in obtaining a false death certificate for Wallace Thrasher to lull law enforcement officers in the investigation of Wallace and Olga Thrasher, by advising Olga Thrasher as to the secreting of proceeds from the unlawful importation and sale of marijuana, and by assisting Olga Thrasher in secreting an Aztec airplane and parts that were a part of the marijuana enterprise. To prove the charge of accessory after the fact, it was necessary to prove that the defendant, knowing of the illegal

activities, committed only one of the three alleged acts with the intent to hinder the apprehension, trial, or punishment of Olga Thrasher. There is ample testimony, including that of the appellant, that he traveled to Jamaica with Olga Thrasher and assisted in obtaining a false death certificate for Wallace Thrasher. There is also evidence from which the jury could draw a reasonable inference that one of the purposes for this false death certificate was to persuade law enforcement authorities that Wallace Thrasher was dead and that the investigation of his activities and those of Olga should end. There was extensive evidence of appellant's assistance to Olga in secreting the drug proceeds.

Count 2 charges a violation of 18 U.S.C. § 1952. This section forbids interstate and foreign travel in aid of racketeering enterprises. To convict, it was necessary to prove that McAfee traveled in interstate or foreign commerce with the intent to (1) distribute the proceeds of an unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in sub-paragraphs (1), (2), and (3). McAfee argues that his conviction was unlawful because there was no proof of an unlawful act

after he traveled to Jamaica. McAfee argues that the entire travel from Virginia to Florida to Jamaica and back to Virginia was one trip and it was necessary for the government to prove that he committed an act to carry out the unlawful activity after completion of the trip. This statute, 18 U.S.C. § 1952, is not subject to such narrow interpretation. Each leg of the journey that involved interstate or foreign travel was sufficient to set the statute in motion. The acts of McAfee in obtaining the false death certificate in Jamaica occurred after he had been involved in both interstate and foreign travel. Appellant's own testimony was sufficient to show interstate and foreign travel with intent to facilitate the promotion of the Thrasher drug

business and the subsequent performance of an act in furtherance of the drug business.

We have already discussed Counts 4 and 5 and they are adequately supported by the evidence.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA

V. JUDGMENT IN A CRIMINAL CASE

CARL E. MCAFEE

CASE NUMBER: 87-00018-R

SS# 227-54-5778

S. D. Roberts Moore, Esquire
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

not guilty as to count(s): all counts.

THERE WAS A:

verdict of guilty as to count(s): 1, 2, 4, 5.

THERE WAS A:

verdict of not guilty as to count(s): 3. The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Accessory after the fact, interstate travel to commit crime, conceal existence of currency from Department of Treasury and cause Bank of Speedwell not to file IRS 4789, in violation of Title 18 U.S.C. §3, 1952 & 2; 1001 & 2 and Title 31 U.S.C. §5313; 5322(a) and 18:2.

IT IS THE JUDGMENT OF THIS COURT THAT:

As to count 1, the defendant is committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a maximum term of fifteen (15) months and that the defendant shall become eligible for parole pursuant to Title 18 U.S.C. §4205(b)(2), immediately. IT IS FURTHER ORDERED that the defendant pay a fine to the United States of America in the sum

of $50,000.00 and defendant is ordered to stand committed until the fine is paid. The order that defendant stand committed is stayed pending appeal.

As to counts 2, 4 & 5 consolidated for sentencing it is ORDERED and ADJUDGED that the imposition of sentence is suspended and the defendant placed on probation for a period of three (3) years to begin upon defendant's release from custody and upon the following terms and conditions:

1. That defendant perform 600 hours community service to be worked out with the Probation Office.

2. That defendant submit to treatment for substance abuse as directed by the Probation Office.

In addition to any conditions of probation imposed above, IT IS ORDERED

that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $200.00 pursuant to Title

18 U.S.C. Section 3013 for count(s) 1, 2, 4 & 5 as follows:

IT IS FURTHER ORDERED that counts _____ are DISMISSED on the motion of the United States.

IT IF FURTHER ORDERED that the defendant shall pay to the United States attorney for his district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

It is further ordered that the execution of this sentence is stayed pending the result of the defendant's appeal to the Fourth Circuit Court of Appeals.

September 9, 1988
Date of Imposition of Sentence

/s/ Jackson L. Kiser
Signature of Judicial Officer

United States District Judge
Name and Title of Judicial Officer

September 9, 1988
Date

APPENDIX C

18 U.S.C.S. §2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(June 25, 1948 ch 645, §1, 62 Stat. 684; Oct. 31, 1951 ch 655, §17b, 65 State. 717)

18 U.S.C.S. §3. Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory

shall be imprisoned not more than ten years.

(June 25, 1948 ch 645 §1, 62 Stat. 684.)

18 U.S.C.S. §1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by a trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch 645, §1, 62 Stat. 749.)

18 U.S.C.S. §1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisined for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act [21 USCS §802(b)]), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

(Added Sept. 13, 1961, P. L. 87-228, §1(a), 75 Stat. 498; July 7, 1965, P. L. 89-68, 79 Stat. 212; Oct.

27, 1970, P. L. 91-513, Title II, Part G, §701(i)(2), 84 Stat. 1282.)

31 U.S.C.S. § 5313. Reports on domestic coins and currency transactions

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

(b) The Secretary may designate a domestic financial institution as an agent of the United States Government to receive a report under this section. However, the Secretary may designate a domestic financial institution that is not insured, chartered, examined, or registered as a domestic financial institution only if the institution consents. The Secretary may suspend or revoke a designation for a violation of this subchapter [31 USCS §§5311 et seq.] or a regulation under this subchapter [31 USCS §§5311 et seq.] (except a violation of section 5315 of this title

[31 USCS §5315] or a regulation prescribed under section 5315 [31 USCS §5315), section 411 of the National Housing Act (12 U.S.C. 1730d) [12 USCS §1730d], or section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829B) [12 USCS §1829b].

(c)(1) A person (except a domestic financial institution designated under subsection (b) of this section) required to file a report under this section shall file the report.

(A) with the institution involved in the transaction if the institution was designated;

(B) in the way the Secretary prescribed when the institution was not designated; or

(C) with the Secretary.

(2) The Secretary shall prescribe--

(A) the filing procedure for a domestic financial institution designated under subsection (b) of this section; and

(B) the way the institution shall submit reports filed with it.

(Sept. 13, 1982, P. L. 97-258, §1, 96 Stat. 996.)

31 U.S.C.S. §5322. Criminal penalties

(a) A person willfully violating this subchapter [31 USCS §§5311 et seq.] or a regulation prescribed under this subchapter [31 USCS §§5311 et seq.] (except section 5315 of this title [31 USCS §5315]) or a regulation prescribed under section 5315 [31 USCS §5315] shall be fined not more than $1,000, imprisoned for not more than one year, or both.

(b) A person willfully violating this subchapter [31 USCS §§5311 et seq.] or a regulation prescribed under this subchapter [31 USCS §§5311 et seq.] (except under section 5315 of this title [31 USCS §5315]) or a regulation prescribed under section 5315 [31 USCS §5315], while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

(c) For a violation of section 5318(2) of this title [31 USCS §5318(2)] or a regulation prescribed under section 5318(2) [31 USCS §5318(2)], a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

(Sept. 13, 1982, P. L. 97-258, §1, 96 Stat. 1000.)

31 C.F.R. §103.22 Report of Currency Transactions (1984)

(a) Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

* * *

FILING AND MAILING CERTIFICATE

I, Barbara E. Grove, hereby certify that on this 10th day of April, 1990, I filed with the Clerk's Office of the United States Supreme Court the foregoing Petition for a Writ of Certiorari and further certify that I mailed this same date the required copies to the opposing counsel listed below:

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(2)

No. 89-1593

In the Supreme Court of the United States

OCTOBER TERM, 1989

CARL E. MCAFEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 5311 *et seq.*, and the regulations promulgated thereunder, prohibit structuring transactions in order to cause a financial institution to fail to file Currency Transaction Reports.

2. Whether petitioner was denied his right to due process of law by a juror's failure to disclose a past personal relationship with an Assistant United States Attorney other than the prosecutor who tried petitioner's case.

3. Whether the district court properly excluded testimony that a reasonably prudent attorney would have given the same advice regarding structuring cash transactions that was given by petitioner.

4. Whether petitioner is entitled to a new trial because of prosecutorial misconduct.

5. Whether the evidence was sufficient to support petitioner's convictions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38) is unpublished, but the decision is noted at 896 F.2d 1368 (Table). The prior opinion of the court of appeals reversing the dismissal of two counts of the indictment (C.A. App. 68-70) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990. The petition for a writ of certiorari was filed on April 12, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of being an accessory after the fact to several drug-related offenses, in violation of 18 U.S.C. 3; traveling in interstate commerce to facilitate a narcotics business, in violation of 18 U.S.C. 1952; concealing a material fact in a government matter, in violation of 18 U.S.C. 1001; and causing a financial institution to fail to file a Currency Transaction Report (CTR), in violation of 31 U.S.C. 5313 and 5322(a). He was sentenced to 15 months' imprisonment on the accessory count, to be followed by a three-year term of probation on the remaining counts.

1. The evidence at trial, which is summarized in the court of appeals' opinion (Pet. App. 4-12), showed that petitioner, an attorney, assisted the wife of a drug trafficker to conceal assets derived from her husband's drug trafficking business in order to protect them from being forfeited to the government.

Wallace Thrasher was an importer of marijuana. After his marijuana-loaded plane crashed on October 17, 1984, Thrasher went into hiding. When the police found the wreckage, Thrasher's wife, Olga, told police her husband was on a business trip. She retained Max Jenkins to represent her husband and herself in any criminal proceedings.

Olga Thrasher was later informed that her husband had died in a plane crash on the way to Belize, where he had intended to explain the first plane crash to his suppliers and obtain another load of marijuana. Jenkins suggested that they confirm Wallace Thrasher's death and contact petitioner, an attorney experienced in dealing with foreign governments. Pet. App. 4-6.

Olga Thrasher subsequently told petitioner about her husband's drug smuggling business and advised him that most of their property had been purchased with drug pro-

ceeds. Petitioner told her it was possible that her property would be seized, and he suggested that it would improve her position to obtain a death certificate for her husband. They were unsuccessful in obtaining more information about Wallace Thrasher's supposed death.[1]

In January 1985, Olga Thrasher was subpoenaed by a federal grand jury in Roanoke, Virginia, to produce evidence of her husband's death, including a death certificate. Petitioner suggested that they obtain a false death certificate in Jamaica. Together with Jenkins and Olga Thrasher, petitioner subsequently flew to Jamaica to obtain two copies of a false certificate listing the cause of death as a "tragic accident." Jenkins and petitioner each kept a copy of the certificate. At petitioner's direction, Olga Thrasher exercised her Fifth Amendment right not to testify before the grand jury, and the death certificate was not mentioned. Also at petitioner's direction, Olga Thrasher later used the death certificate in purchasing a house in Florida and to support a claim on her husband's life insurance policy. Pet. App. 6-7, 10-11.

Petitioner advised Olga Thrasher in connection with her purchase of a condominium in Wytheville, Virginia, for $85,000 cash. He told her any newly acquired property might be subject to seizure by the government and suggested that she obtain a loan or form a corporation to buy the condominium. Petitioner advised her that if she converted the money into cashier's checks she should purchase them in amounts of less than $10,000 each at different branches of several banks to avoid the requirement that the bank file a Currency Transaction Report for a cash

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[1] Petitioner admitted at trial that he never believed Wallace Thrasher was dead. C.A. App. 923.

transaction in excess of $10,000.[2] On December 13, 1984, Olga Thrasher and her housekeeper purchased ten cashier's checks for less than $10,000 each using different branches of three banks. Sovran Bank and Bank of Virginia realized that the purchases involved a total of more than $10,000 in a single day and filed CTRs; the Bank of Speedwell, however, did not file a form. Olga Thrasher then used the cashier's checks to pay for the condominium. Pet. App. 8-10.

Olga Thrasher also wanted to have an airplane overhauled and to have it fitted with long-range full tanks so that it could be used for future drug shipments. Petitioner,

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[2] Under federal law, a financial institution is required to file a CTR whenever a customer makes a currency payment in excess of $10,000. 31 U.S.C. 5313 (formerly 31 U.S.C. 1081, 1082, 1083 (1976)); 31 C.F.R. 103.22(a) (1982).

Section 5313(a) (31 U.S.C.) provides in relevant part:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency * * * in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

Section 103.22(a) (31 C.F.R. (1982)) provides:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

Each Currency Transaction Report form contained the following provision (Treasury Form 4789 (1980)):

> * * * Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

who had an interest in an air charter business, suggested that his mechanic could do the work and recommended that petitioner place a lien on the plane to prevent its forfeiture and as security for his fee. The airplane parts were moved to the site of petitioner's business, but one of Olga Thrasher's associates later moved the plane and the parts to Florida without petitioner's knowledge. Pet. App. 7-8.

2. Before trial, petitioner filed a motion to dismiss the false statement and CTR counts on the ground, *inter alia*, that the CTR statute did not provide notice that his conduct violated the CTR requirements. C.A. App. 24-25. The district court granted the motion. It found that because none of the cashier's checks that Olga Thrasher bought had a face value of more than $10,000, the bank had no duty to file CTRs. For that reason, the court concluded, petitioner could not be held criminally liable on the false statement and CTR offenses. *Id.* at 64-67.

The government took a pretrial appeal on those counts. The court of appeals reversed in an unpublished opinion and reinstated the false statement and CTR counts. The court ruled that the bank had a duty to file CTRs whenever a customer engaged in separate transactions on the same day aggregating more than $10,000, and that petitioner could be criminally liable for causing the bank to fail to file CTRs in connection with those transactions. Pet. App. 28-29.

3. During the *voir dire* of prospective jurors, the district court and counsel asked a number of questions regarding whether they knew any attorneys. C.A. App. 346-353, 363-369. Lyn Jackson, who was ultimately selected as a juror, was a television news anchor in Roanoke, Virginia. She stated that she knew a number of lawyers because she frequently covered stories about litigation. Pet. App. 12-13. She was the first prospective juror to volunteer, in response to the court's questions, that she knew de-

fense counsel and the prosecutor, Assistant United States Attorney Richard Pierce, professionally, C.A. App. 346-347; Pet. App. 14-15. Another prospective juror said he knew defense counsel socially and three others said they had served on juries in cases in which Pierce was the attorney for the government. C.A. App. 347-349. Immediately thereafter, the court asked the jurors about contacts with the United States Attorney's office and defense counsel as follows (Pet. App. 15-16; C.A. App. 349):

> All right. Well, let me say this, the fact that you may have seen someone—I'm talking more about professional or social contact on an individual basis.
>
> The fact that you have seen a name in the paper or whatever, been in the courtroom, is not the type of information I am really looking for.
>
> With that caveat, do we have any more hands?
>
> All right, have any of you had any dealings of any kind with the United States Attorney's office in Roanoke, Virginia: had any occasion to have any type of contact with the office for which Mr. Pierce works?

He received no response. C.A. App. 349. Later, Jackson replied in response to questions by the prosecutor that she knew one lawyer he mentioned by name only and that she knew a lot of lawyers. *Id.* at 365, 369. There were no follow-up questions to her statements that she knew various lawyers. She also stated that she knew about Olga Thrasher's case from news accounts but did not know specific details about the case. *Id.* at 350.

About ten days after trial, petitioner and his trial counsel learned that Jackson had been romantically involved with Assistant United States Attorney Thomas Bondurant. Bondurant was not actively involved in trial of this case but had interviewed one of the government's primary wit-

nesses. Pet. App. 12-13. Petitioner moved for a new trial on the ground that he had been denied his constitutional right to trial by an impartial jury. He claimed the information was known to the United States Attorney's office but not to him and that he could not have discovered it through due diligence. *Id.* at 13.

The district court held an evidentiary hearing at which Jackson testified that her relationship with Bondurant had ended two and a half years earlier, that it had lasted a couple of months, and that it was "not * * * serious." Pet. App. 14; C.A. App. 1989. She also testified that when the court asked about professional and social contacts with attorneys she thought she had already answered the question when she said she knew the prosecutor and that the question was directed at other jurors who had not responded. She stated that she answered all the questions as she understood them, and that she did not think of Bondurant during the questioning. She also testified that she had no prior knowledge of petitioner and had no bias against him. Pet. App. 16-17.

Bondurant testified that he talked to Jackson on the telephone occasionally but he had not seen her in more than a year. Pierce testified that he knew Bondurant and Jackson had dated but that the information had not seemed significant and he had not understood the judge to be asking about social contacts with anyone not in the courtroom. Pet. App. 17-18.

The district court denied the motion for a new trial. C.A. App. 161-171. The court found that, viewed objectively, the court's questions on voir dire sought information that Jackson failed to disclose. The court further found, however, that Jackson's failure to provide the information was not intentional but was the result of a misunderstanding or inattentiveness. The court also found that Jackson had answered the questions as she under-

stood them honestly and that she was not biased against petitioner. Pet. App. 18-19.

4. The court of appeals affirmed. Pet. App. 1-38. It held that the district court's findings that Jackson's failure to disclose her previous relationship was the result of a misunderstanding or inattentiveness and that she was not biased were not clearly erroneous. *Id.* at 20-21. The court also rejected each of petitioner's remaining challenges to his convictions, including the claim that the evidence was insufficient to support the convictions and that the prosecutor engaged in misconduct at trial. *Id.* at 25-38.

ARGUMENT

1. Petitioner contends (Pet. 12-15) that this Court should review the government's theory that it is illegal to cause a financial institution to fail to file CTRs. The same claim has been before the Court in several recent cases, and in each case the Court denied certiorari. See *Bruno* v. *United States*, 110 S. Ct. 721 (1990); *Meros* v. *United States*, 110 S. Ct. 322 (1989); *Lafaurie* v. *United States*, 486 U.S. 1032 (1988); *Perlmutter* v. *United States*, 485 U.S. 935 (1988); *Florez* v. *United States*, 484 U.S. 1060 (1988); *Giancola* v. *United States*, 479 U.S. 1018 (1986); *Heyman* v. *United States*, 479 U.S. 989 (1986). In our briefs in opposition in those cases, we noted that there has been some division among the circuits on this and related issues arising from prosecutions under Section 5313.[3] Congress, however, has recently enacted the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18, which is included as Subtitle H of the Anti-Drug

[3] We have furnished counsel with a copy of our brief in opposition in the *Bruno* case, in which we restated the arguments that we had previously made in the *Meros*, *Lafaurie*, *Perlmutter*, *Florez*, *Giancola*, and *Heyman* cases.

Abuse Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 3207. The Money Laundering Control Act was expressly designed to overrule the cases that conflict with the results reached by the court of appeals here. The new law deprives the statutory issue presented in the petition of any continuing significance. Accordingly, petitioner's claim does not warrant further review by this Court.

a. Under Section 5313 and its accompanying regulations, only financial institutions have a duty to file CTRs in connection with cash transactions. Several courts of appeals have nevertheless recognized that under 18 U.S.C. 2(b) a defendant may still be held criminally liable for causing a financial institution to violate its statutory duties. *United States* v. *Lafaurie*, 833 F.2d 1468, 1470-1471 (11th Cir. 1987), cert. denied, 486 U.S. 1032 (1988); *United States* v. *Richeson*, 825 F.2d 17 (4th Cir. 1987); *United States* v. *Heyman*, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986); *United States* v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Puerto*, 730 F.2d 627 (11th Cir.), cert. denied, 469 U.S. 847 (1984); *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). See also *United States* v. *Thompson*, 603 F.2d 1200 (5th Cir. 1979). Other courts have taken a contrary view, holding that because 31 U.S.C. 5313 and the applicable regulations do not impose on third parties a duty to file CTRs, Section 2(b) cannot be read to impose criminal liability on third parties who, by structuring their transactions, cause a financial institution to fail to file a CTR. See, *e.g.*, *United States* v. *Gimbel*, 830 F.2d 621, 624-625 (7th Cir. 1987); *United States* v. *Larson*, 796 F.2d 244 (8th Cir. 1986); *United States* v. *Reinis*, 794 F.2d 506, 508 (9th Cir. 1986); *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985).

Whatever the merit of the latter decisions in construing Section 5313, Congress has totally revised the law in this

area by enacting the Money Laundering Control Act of 1986. The explicit purpose of the new Act was to overrule the decisions in *Anzalone* and *Varbel* and to codify the decision in *Tobon-Builes*. Section 1354(a) of the Act, entitled "Structuring Transactions to Evade Reporting Requirements Prohibited," creates a new section of Title 31 (Section 5324), which provides as follows:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR as well as for structuring deposits, as petitioner did here, for the purpose of evading the reporting requirements of Section 5313. In formulating these statutory obligations, Congress made clear that its purpose was to overrule the First and Ninth Circuit decisions in *United States* v. *Anzalone*, *supra*, and *United States* v. *Varbel*, *supra*, and the Eleventh Circuit decision in *United States* v. *Denemark*, 779 F.2d 1559 (1986). The Senate Committee on the Judiciary, reporting favorably on an identical provision in S. 2683, 99th Cong., 2d Sess. (1986), an earlier version of the

money laundering bill, stated (S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986)):

> Under present law, money launderers are successfully prosecuted in some judicial circuits for causing financial institutions not to file reports on multiple currency transactions totaling more than $10,000 or causing financial institutions to file incorrect reports. In such cases, the actual money launderers are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and section 1001 (concealing from the Government a material fact by a trick, scheme, or device). For example, in *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit Court of Appeals upheld a conviction under 18 U.S.C. 1001 where the defendants had engaged in a money laundering scheme in which they had structured a series of currency transactions, each one less than $10,000 but totaling more than $10,000, to evade the reporting requirements. * * * In contrast, the First Circuit Court of Appeals, in *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985), the Eleventh Circuit Court of Appeals in *United States* v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986), and the Ninth Circuit Court of Appeals in *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986) have held that structuring currency transactions to avoid the reporting requirements did not violate 18 U.S.C. section 1001.
>
> Subsection (h) would codify *Tobin-Builes* and like cases and would negate the effect of *Anzalone*, *Varbel* and *Denemark*. It would expressly subject to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a

> required report that contains material omissions or misstatements of fact. In addition, the proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

The House intended precisely the same results when it formulated a virtually identical version of the money laundering provisions. The Committee on Banking, Finance and Urban Affairs stated (H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-19 (1986)):

> In some judicial circuits, money launderers have been successfully prosecuted for causing financial institutions not to file reports on such multiple currency transactions. In such cases, defendants are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and Section 1001 (concealing from the government a material fact by a trick, scheme, or device).[4]
>
> In contrast, other cases have held that the Act and its regulations impose no duty on the customer to inform the financial institution of the structured nature of the transactions, that the reporting duties are placed solely upon the financial institution, and therefore, only a financial institution can directly violate the reporting requirements.[5]
>
> The Committee believes that Section 2 of H.R. 5176 would resolve the legal issues raised by the various circuit courts by expresssly subjecting to potential

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[4] For this proposition, the House Report cited the Eleventh Circuit's decision in *Tobon-Builes*. H.R. Rep. No. 746, *supra*, at 18 n.1.

[5] For this proposition, the House Report cited, *inter alia*, *Anzalone* and *Varbel*. H.R. Rep. No. 746, *supra*, at 19 n.2.

> liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, it would create the offense of structuring a transaction to evade the reporting requirements, without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

In light of this new legislation, there is no reason to expect that the previous conflict among the circuits will persist. Accordingly, review by this Court is unwarranted.

b. In any event, the court of appeals' decision is correct under the law as it existed prior to the enactment of the Money Laundering Control Act of 1986.

The Court below did not address in detail the underlying question whether a third party who causes a bank to breach its reporting obligations may be held liable under Section 5313, having resolved that issue in its earlier decision in *United States* v. *Richeson, supra*. In *Richeson*, the court of appeals had held that although the duty to file CTRs is imposed only on financial institutions, a third party who causes the institution to violate its duties may be convicted under 18 U.S.C. 2(b).[6] That holding comports with the broad language of Section 2(b), which extends liability to anyone who "causes an act to be done which if directly performed by him or another would be an offense

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[6] Correspondingly, a third party who conspires to cause a bank to violate its reporting obligations may be convicted under 18 U.S.C. 371. See *United States* v. *Sans*, 731 F.2d 1521, 1530-1532 (11th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Lester*, 363 F.2d 68, 73-74 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

against the United States." As the reviser's note to 18 U.S.C. 2 states, the aiding and abetting statute

> removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.[7]

Those principles apply here as well. A bank customer's success in preventing the bank from filing CTRs cannot shield him from liability under Section 2(b). Petitioner was lawfully convicted on that basis.

Petitioner contends (Pet. 12-15), however, that by enacting the 1986 amendments to the CTR provisions—which, petitioner admits (Pet. 15), squarely apply to his conduct—Congress effectively acknowledged that the CTR provisions, as unamended, did not cover petitioner's

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[7] The reviser's note also indicates that Section 2 was intended to embrace this Court's decision in *United States* v. *Giles*, 300 U.S. 41, 43 (1937). There, the Court upheld the conviction of a bank teller under a statute that prohibited bank employees from "mak[ing] any false entry in any book * * * of [a] Federal reserve bank or member bank." The defendant was convicted of having caused a bookkeeper for the bank to make false deposit entries in the bank's ledger, by wrongfully withholding from circulation certain deposit slips prepared for particular bank customers. Although the defendant had not himself made the false entries, and although the "innocent bookkeeper was the teller's * * * unconscious agent," the Court held that "the statute [was] broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows." 300 U.S. at 48-49. So, too, for Section 2(b): it applies even where the defendant, by his actions, causes an innocent intermediary unwittingly to violate the law. Accord *United States* v. *Ruffin*, 613 F.2d 408, 412-413 (2d Cir. 1979); *United States* v. *Catena*, 500 F.2d 1319, 1322-1323 (3d Cir.), cert. denied, 419 U.S. 1047 (1974); *United States* v. *Levine*, 457 F.2d 1186, 1188-1189 (10th Cir. 1972); *United States* v. *Lester*, *supra*.

conduct in 1982. That contention is meritless. In enacting the 1986 statute, Congress took no position on which view was correct as an interpretation of the prior statute. It is often the case that when Congress resolves a conflict among the circuits, it does not necessarily mean to suggest that the position it rejects was the correct reading of prior law; as in this case, Congress often acts simply to correct confusion among the circuits, even if it regards the amended statute as consistent with the proper interpretation of the prior law. Thus, no inference can be drawn from the fact that Congress decided to clarify the Bank Secrecy Act by enacting Section 5324.

2. Petitioner contends (Pet. 6-9) that he should be granted a new trial because juror Lyn Jackson failed to disclose on *voir dire* her prior relationship with Assistant United States Attorney Thomas Bondurant and "[t]he relationship * * * is so strongly indicative of bias that a new trial is warranted." Petitioner's claim is without merit.

To obtain a new trial because of a juror's failure to respond to questions during *voir dire*,

> a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

McDonough Power Equipment, Inc. v. *Greenwood*, 464 U.S. 548, 556 (1984). Where information comes to the attention of the trial court that suggests that a juror may not be impartial, the appropriate course is to hold a factfinding hearing and determine whether the juror is actually biased, taking into consideration the testimony of the juror. *Smith* v. *Phillips*, 455 U.S. 209, 215 (1982); *Remmer* v. *United*

States, 347 U.S. 227, 228-230 (1954).[8] Here, the district court held an evidentiary hearing and concluded that Jackson had not acted dishonestly in failing to disclose her previous relationship with Bondurant, but instead had misunderstood the question. The court of appeals properly determined the district court's finding on that point was not clearly erroneous. Jackson had volunteered several answers regarding her acquaintances with lawyers and there had been no follow-up questions. When the court asked about professional or social contact with attorneys after Jackson had already volunteered answers regarding her acquaintances, the court specifically asked whether there were "any more hands." The court's question regarding contacts with the United States Attorney's office immediately followed the request for "more hands." The district court accepted Jackson's testimony that she thought she had already answered the questions and that the court was seeking answers from other jurors who had not responded.

Nor does petitioner's challenge meet the second prong of the *McDonough Power* test, that "a correct response would have provided a valid basis for a challenge for cause." Nothing in the record suggests that Jackson was biased against petitioner or in favor of the prosecution because of her brief personal relationship, ending several years earlier, with an Assistant United States Attorney

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[8] Some courts have suggested that courts should hesitate to question jurors post-trial about their personal lives absent strong evidence that a specific impropriety has occurred that could have prejudiced a defendant. See *Neron* v. *Tierney*, 841 F.2d 1197 (1st Cir. 1988) (declining to intrude on juror privacy where juror had had a relationship with a defendant's son and juror had slight contact with defendant's family); *United States* v. *Sun Myung Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984).

other than the prosecutor. That question does not merit further review.[9]

3. Petitioner next claims (Pet. 15-17) that the district court improperly excluded testimony by an attorney that petitioner's advice to Olga Thrasher regarding structuring cash transactions was consistent with the conduct expected of a reasonably prudent attorney in the area at the time.

Expert testimony is admissible if it will assist the trier of fact to understand the evidence in the case. Fed. R. Evid. 702. The district court has wide discretion to admit or exclude such testimony. *Hamling* v. *United States*, 418 U.S. 87 (1974). The district court found that the evidence proffered in this case would confuse the jury because it was inconsistent with the governing law that structuring cash transactions was unlawful. A court is not required to admit expert testimony that would contradict or undercut the district court's instructions to the jury regarding the law. *Adalman* v. *Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir. 1986); *United States* v. *Zipkin*, 729 F.2d 384 (6th Cir. 1984); *Marx & Co.* v. *Diners' Club, Inc.*, 550 F.2d 505 (2d Cir.), cert. denied, 434 U.S. 861 (1977).[10] The district court therefore did not err in excluding the evidence.

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[9] Petitioner's reliance on *Cannon* v. *Lockhart*, 850 F.2d 437 (8th Cir. 1988), is misplaced. The court in that case concluded that *McDonough Power* does not require dishonesty by the juror, but that it does require a showing of actual bias. Because both the Eighth Circuit in *Cannon* and the Fourth Circuit in this case required a showing of actual bias and found no actual bias in the cases before them, there is no conflict among the circuits that requires resolution in this case.

[10] Petitioner's reliance on *Marx & Co., supra*, is misplaced. There, the court held that an attorney was properly barred from testifying as to the legal standards that governed the contract at issue because that testimony was not only about customary practices of a trade or business but also about the applicable principles of law, and it was the judge's role to instruct on the applicable law. 550 F.2d at 508-510. See generally 7 J. Wigmore, *Evidence* § 1952 (Chadbourn rev. 1978).

4. Petitioner contends (Pet. 9-12) that he is entitled to a new trial because, he claims, the prosecutor asked a series of improper questions (*Ibid.*). The court of appeals properly rejected that contention.

At trial, the prosecutor asked petitioner a question about whether one of petitioner's planes was supposed to bring a load of marijuana from Colombia (C.A. App. 1655), and questions about petitioner's tax returns (*id.* at 1651-1652). Petitioner objected in both cases, and the objections were sustained. The prosecutor also asked a defense witness about his involvement with a politician (*id.* at 1449-1450), and petitioner's objection was sustained. In addition, the prosecutor asked petitioner a question regarding petitioner's drinking problem (*id.* at 1657), and he asked a defense witness about his contacts with drug dealers (*id.* at 1344-1345), both without objection. The prosecutor provided the court with a sealed foundation letter setting forth the foundation for his inquiries on several of those points (*id.* at 153-155).

The court of appeals held that the questions did not deprive petitioner of a fair trial. Pet. App. 25-26. The questions about petitioner's income and his possible involvement in drug dealing were relevant to the question whether petitioner's services to Olga Thrasher were purely legal or whether they were part of a scheme relating to drug dealing in which petitioner was involved. The question regarding a defense witness's involvement with a politician was interrupted by an objection before it could possibly have had any significance for the jury. The other inquiries passed without objection and could not have had a significant effect on the trial. Under the circumstances, the court of appeals was correct that petitioner suffered no unfair prejudice from the prosecutor's cross-examination of the witnesses for the defense.

5. Finally, petitioner claims (Pet. 17-20) that the evidence against him was insufficient. The court of appeals disagreed. It found "ample testimony" to show that peti-

tioner assisted in obtaining the false death certificate for Wallace Thrasher, and sufficient evidence from which the jury could infer that one of the purposes for obtaining the certificate in Jamaica was to persuade law enforcement authorities to end their investigation of the Thrashers' drug importation activities. Pet. App. 35. The court also found "extensive evidence" that petitioner had assisted Olga in secreting the drug proceeds. *Ibid.* Thus, the court concluded, the evidence was sufficient to show that petitioner acted as an accessory after the fact to the drug trafficking. The court also found the evidence sufficient to show that petitioner traveled in commerce in furtherance of the Thrashers' drug trafficking activities, *id.* at 36-38, and it summarily rejected petitioner's claim that the evidence of the CTR violations was insufficient, *id.* at 38.

The evidence showed that petitioner was instrumental in arranging to structure the cash transactions to avoid having CTRs filed, and that petitioner's services to Olga Thrasher were designed to avoid investigation of the drug offenses that had generated the assets that petitioner sought to shield from forfeiture. That evidence was amply sufficient to support petitioner's convictions on each of the crimes of which the jury found him guilty.[11]

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[11] Petitioner lists as an issue (Pet. iii) the question whether his conviction under 18 U.S.C. 1001 and 31 U.S.C. 5313 and 5322 for conduct involving the structuring of banking transactions violates the Double Jeopardy Clause, but he does not address the issue in the petition. In any case, the court of appeals correctly held that the question is controlled by this Court's analysis in *United States* v. *Woodward*, 469 U.S. 105 (1985), where the Court rejected a similar challenge to a prosecution under 18 U.S.C. 1001 and 31 U.S.C. 1058 and 1101, which relate to the failure to file reports of importation or exportation of currency. Because each statute required proof of a fact not required by the other, and because neither the text nor the legislative history of either statute indicated that Congress intended to prohibit cumulative punishment, the Court upheld the filing of charges under both statutes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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